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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-388

THE BOARD OF SUPERVISORS OF FAIRFAX COUNTY, VIRGINIA, *Petitioner,*

v.

ROY G. ALLMAN, Trustee, ET AL., *Respondent.*

THE BOARD OF SUPERVISORS OF FAIRFAX COUNTY, VIRGINIA, *Petitioner,*

v.

THOMAS R. WILLIAMS, ET AL., *Respondent.*

REPLY BRIEF OF PETITIONERS

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THOMAS R. WILLIAMS, ET AL., *Respondent.*

REPLY BRIEF OF PETITIONERS

ARGUMENT

I. The Supreme Court of Virginia Relied on the Fourteenth Amendment to the United States Constitution.

Respondents contend:

> Nowhere is there a reference to or reliance upon the findings of a federal case.[57] Nowhere in the *Allman* or *Williams* holdings is there a reliance upon either the principles derived from or language found in the Federal Constitution, federal statutes, or federal case law. Brief in Opposition, p. 34.

It is interesting to note that Respondents' footnote 57 admits a citation to *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926). The Board has already shown a clear reliance on the case law of this Court.[1]

[1] *See* Petition For Writ of Certiorari, p. 15, note 2.

A. Equal Protection

The Board has also traced and clearly shown a reliance on Equal Protection.[2] This reliance was specifically acknowledged by Justice Cochran, who concurred in *Allman,* in his dissent in *Williams* and by Justice Poff, a member of the majority in both *Allman* and *Williams,* in his opinion in *Board of Supervisors of James City County* v. *Rowe,*[3] another land use case decided the same day as *Williams* and the same day rehearing was denied in *Allman.* Interestingly, Respondents have not seen fit to address *Rowe* in their Brief in Opposition.

As noted[4] the *Virginia Constitution* does have a discrimination clause but does not have a equal protection clause. The discussion of the discrimination clause in *The Constitution of Virginia: Report of the Commission on Constitutional Revision,* cited by Respondents, should be decisive.

> *Anti-discrimination clause.* The antidiscrimination clause which the Commission proposes adding at the end of section 11 would perform functions analogous to those of the federal equal protection clause, except that the language proposed for section 11 is more tightly drafted than the federal provision and therefore is less open-ended in its possibilities of application than is the federal language. *Id.,* at p. 96. *See also,* Howard, *Commentaries on the Constitution of Virginia,* (1974), p. 234.

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[2] *Id.,* pp. 11-15.

[3] 216 S.E.2d 199 (Va. 1975) reprinted in *Appendix* of Petition For Writ of Certiorari.

[4] Petition For Writ of Certiorari, p. 14, note 9.

The pertinent part of section 11[5] reads as follows:

> . . . that the right to be free from any governmental discrimination upon the basis of religious conviction, race, color, sex or national origin shall not be abridged . . . .

Clearly, then, the references to the "constitutional right to equal protection" and "equal protection guarantee" are far beyond the "tightly drafted" Virginia constitutional provision on discrimination and find their basis in the Fourteenth Amendment to the United States Constitution.[6]

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[5] This provision is printed in its entirety in the Petition For Writ of Certiorari at Footnote 9.

[6] Respondents contend at page 32 of the Brief in Opposition that the Board has previously stated that the Equal Protection Clause of the Fourteenth Amendment has been codified in Virginia in *Va. Code Ann.* § 15.1-488. Taken in context the refereneed statement is hardly so broad. Section 15.1-488 reads as follows:

> Regulations to be uniform—All such regulations shall be uniform for each class or kind of buildings and uses throughout each district, but the regulations in one district may differ from those in other districts. (*See Appendix* to Petition For Writ of Certiorari, p. 89)

This statute simply means that one RE-1 (single family residence—one acre) district as applied to one specific piece of property must have the same regulations as an RE-1 district applied to another piece of property. However, R-12.5 (single family residence—12,500 square feet) districts may have different regulations than RE-1 districts.

When read, the simplicity of this statute also makes ridiculous Respondents' apparent contention that the Supreme Court of Virginia based its decisions in *Allman, Williams* and *Rowe* on this statutory provision. Brief in Opposition, pp. 30-31. At no point did Allman or Williams contend that the regulations in their RE-1 district were any different from regulations in other RE-1 districts.

It should also be noted that *Board of Supervisors* v. *Carper,* 107 S.E.2d 390 (Va. 1959), the case which Respondents contend was the basis for the lower court's holding in *Allman* and *Williams* under *Va. Code Ann.* § 15.1-488, was written by Justice I'Anson who joined the dissent in *Williams.*

Respondents cite cases which specifically rely on the *Virginia Constitution.*[7] They admit, however, that neither *Allman* nor *Williams* does so.[8] Not a single provision of the *Virginia Constitution* was cited, or discussed in either *Williams* or *Allman.* Respondents cite no case where the Supreme Court of Virginia uses "equal protection" when referring to the State Constitution or statutes. Cases are cited in which the Supreme Court of Virginia has specifically cited the Fourteenth Amendment.[9] In three of the four cases cited, the Virginia court upheld the challenged acts against a Fourteenth Amendment challenge. In the fourth case, *Williams* v. *City of Richmond,*[10] the actions were declared unconstitutional under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The latter is referred to as "a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment of the Federal Constitution" and the "equal protection provision of the Constitution." Justice Poff in *Rowe* calls it "the equal protection guarantee," and "equal protection of the laws." Justice Cochran in dissent in *Williams* calls it the "constitutional right to equal protection."[11]

It is also very damaging to Respondents' position that in *Williams* v. *City of Richmond,*[12] the Supreme

[7] Brief in Opposition, pp. 20-22.

[8] *Id.*, p. 36.

[9] *Id.*, p. 28, note 46.

[10] 14 S.E.2d 287, 292 (Va. 1941).

[11] *See* Petition for Writ of Certiorari, pp. 12-13.

[12] *See* note 10, *supra.*

Court of Virginia in discussing the Fourteenth Amendment Equal Protection states:

> A classification will not be sustained however, where it is arbitrary or capricious, and rests on no substantial or reasonable basis. In *Bell's Gap Railroad Co.* v. *Pennsylvania,* 134 U.S. 232, 233, 10 S.Ct. 533, 535, 33 L.Ed. 892, it is said: "But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition. *Id.*, 14 S.E.2d at 292.

"Discrimination," "arbitrary," "capricious" and "reasonable" are the very words which Respondents maintain dictate a reliance on state law.[13] However, here they are used by the Supreme Court of Virginia when discussing Fourteenth Amendment Equal Protection. When combined with the use of "equal protection" by Justices Cochran and Poff and the absence of the use of "equal protection" when referring to state law in the case law of Virginia, it becomes clear that the *Allman-Williams-Rowe* trilogy rely on the Fourteenth Amendment as does *Williams* v. *City of Richmond, supra.*[14]

B. Due Process

In arguing that *Allman* and *Williams* were based on State law, Respondents cite *Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949) and *Ferguson* v. *Skrupa*, 372 U.S. 726 (1963),

[13] Brief in Opposition, pp. 12, 24, 26-7.

[14] *Compare Township of Mount Laurel* v. *Southern Burlington County NAACP*, 336 A.2d 713 (N.J. 1975); *Appeal dismissed, cert. denied* 44 U.S.L.W. 3181 (U.S. Oct. 6, 1975) in which the Supreme Court of New Jersey specifically relied on state constitutional provisions.

for the proposition that this Court has taken a "hands off" attitude to the state exercise of the police power in the economic area.[15] Their reliance is misplaced.

It is noteworthy that in Section III of the Brief in Opposition, where Respondents argue for denial even assuming state court reliance on the Fourteenth Amendment, *Lincoln Federal* and *Ferguson* are conspicuous by their absence. The fundamental point in both cases is that in each this Court sustained a state legislative exercise of the police power in the economic sphere and refused to authorize judicial interference.

In the cases involved in this Petition a state legislative exercise of the police power has been overruled by judicial reliance on substantive due process. In *Lincoln Federal* and *Ferguson*, the exercise of state legislative power was protected and judicial reliance on discredited notions of substantive due process was expressly disavowed by this Court. Respondents' Brief in Opposition is corroborative of the need for a grant of certiorari in this matter. The constitutional issue is clear. Respondents contend that even assuming the presence of federal grounds, *Williams* and *Allman* are correctly decided. *See* Brief in Opposition, p. 36. This can only mean that state courts may use the Fourteenth Amendment to displace the legislative judgment even though federal courts may not.

It has been understood for a generation that the judicial abdication, at least on Federal Constitutional grounds, is to be the norm in areas such as zoning where substantive economic rights are at stake. As far back as 1962, Professor McCloskey, reviewing the trend of

[15] Brief in Opposition, p. 18.

substantive due process cases in this Court, reached the following conclusion:

> [N]o claim of substantive economic rights would now be sustained by the Supreme Court. The judiciary has abdicated the field.[16]

The death certificate, if one was needed, for substantive due process can be found in *North Dakota State Pharmacy Board* v. *Snyder's Drug Store*, 414 U.S. 156 (1973), explicitly overruling *Louis K. Liggett Company* v. *Baldridge*, 278 U.S. 105 (1928), as being in "that vintage of decisions which exalted substantive due process by striking down state legislation which a majority of the Court deemed unwise." 414 U.S. at 164. *Snyder* adopts the Holmes-Brandeis view eschewing the use of the due process clause to subordinate legislative judgment to the judicial enhancement of private economic rights. Mr. Justice Douglas quoted in *Snyder* from *Lincoln Federal, supra*, in order to illustrate the demise of substantive due process in Fourteenth Amendment litigation:

> "This Court beginning at least as early as 1934, when the *Nebbia* case was decided, has steadily rejected the due process philosophy enunciated in the *Adair-Coppage* line of cases. In doing so it has consciously returned closer and closer to the earlier constitutional principle that states have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of *some valid* federal law. . . . *Under this constitutional doctrine the due process clause is no longer to be so broadly construed that the Con-*

[16] McCloskey, *Economic Due Process in the Supreme Court: An Exhumation and Reburial*, 1962 Supreme Court Review 34, 38.

> *gress and state legislatures are put in a straitjacket when they attempt to suppress business and industrial conditions which they regard as offensive to the public welfare." 335 U.S., at 536-537.* 414 U.S. at 164-5. (Emphasis added)

In other words, this Court in *Snyder* took pains to endorse the view that the due process clause of the Fourteenth Amendment cannot be used to put state legislative power "in a straitjacket." *Snyder* makes it unmistakably clear that substantive due process as Fourteenth Amendment doctrine is dead in the state supreme courts. In this connection, it should be remembered that *Snyder* came to this Court from a state supreme court under the very same jurisdictional provision, 28 U.S.C. 1257 (3), which is the basis for jurisdiction in this case.

The issue in this case is not whether pursuant to a specific reliance on the state constitution, a state may continue to follow the doctrine of substantive due process, itself an issue not free from doubt.[17] The issue is whether or not a state court relying on the Federal Constitution may ignore Supreme Court precedents with respect to substantive due process. On this latter point, the Brief in Opposition is entirely unresponsive. Thus, we note that Respondent cites *Boomer* v. *Olsen*, 143 Neb. 579, 10 N.W.2d 507 (1943) on page 17 in its Brief in Opposition. In *Boomer*, the Supreme Court of Nebraska struck down the same statute under the Nebraska Constitution which this Court had held valid under the Fourteenth Amendment. *Boomer* is precedent for Petitioner, not Respondents. Unlike *Williams* and *Allman*, the *Boomer* case was an explicit, exclusive, and unmistakable example of reliance on state constitutional provisions. In *Williams* and *Allman*, no such explicit reliance, exclusive or otherwise, on state constitutional provisions can be found.

[17] *See* Howard, *Commentaries on the Constitution of Virginia, supra,* p. 195; "The rise and fall of substantive due process in Virginia closely parallel the corresponding evolution of judicial economic regulation in the federal courts." We note that Respondent relies on *Moore* v. *Sutton*, 39 S.E.2d 348 (Va., 1946), for the continuing vitality of substantive due process as a matter of state constitutional law. *Moore* v. *Sutton* is characterized by Professor Howard "as the last gasp of economic substantive due process in Virginia." Howard, *supra,* p. 199. *Cf.* also Sandalow, *Henry* v. *Mississippi and the Adequate State Ground, Proposals for a Revised Doctrine,* 1965 Sup. Ct. Rev. 187, 201-202, quoted in the Petition for Writ of Certiorari, p. 50.

Respondent contends that this Petition is an attempt to produce a federal constitutional issue when none exists. It would be far more accurate to say, however, that Respondent is insisting on exhuming a doctrine in federal constitutional law which no longer exists, i.e., substantive due process.

This Petition for Certiorari is sought, in part, because the Virginia judiciary has refused to abdicate the field of substantive economic regulation in the areas of zoning and planning. It is Petitioner's contention that where judicial intrusion into the planning process is based on the Fourteenth Amendment, the Fourteenth Amendment is violated when judicial judgment is substituted for legislative judgment.

II. The Principles Enunciated in Allman and Williams Have the Potential for Far More than Local Effect.

A. The Effect Has Already Reached Beyond Fairfax County in Virginia.

Respondents contend that *Allman* and *Williams* have no precedential value because the cases involved isolated factual patterns in Fairfax County and involved

the actions of a particular Board of Supervisors.[18] This representation of Respondents has already been proved incorrect. The actions of two other Virginia jurisdictions in land use have been reversed on the basis of *Allman* and *Williams* citing the "discriminatory and, therfore, arbitrary and capricious" language.[19]

B. The Effects May Be National.

Respondents submit that there is little, if any, interplay between the land use and statutory construction decisions of the state courts.[20] *Board of Supervisors* v. *Carper,*[21] the case most often cited by Respondents, contradicts the former contention since it has been used as precedent in Ohio, Maryland, Massachusetts, and New Jersey.[22]

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[18] Brief in Opposition, pp. 39-44. It should be noted that the subject Board of Supervisors took office in January, 1972. Allman's rezoning was denied in October, 1971, by the previous Board. *Allman,* Appendix I, p. 4.

[19] Arlington County, Virginia—*County Board of Arlington County* v. *God,* slip op. Sept. 5, 1975; City of Fairfax, Virginia—*City Council of the City of Fairfax, Virginia* v. *Swart,* slip op., Sept. 5, 1975. Both cases are reprinted in the Appendix to this Brief.

[20] Brief in Opposition, p. 38.

[21] 107 S.E.2d 390 (Va. 1959).

[22] *County Commissioners of Queen Anne's County* v. *Miles,* 228 A.2d 450, 457 (Md., 1967); *The State ex rel. Grant Ex'r.* v. *Kiefaber* 181 N.E.2d 905, 914 (Ohio, 1960); *Brd. of Appeals of Hanover* v. *Housing Appeals Com.,* 294 N.E.2d 393, 423 (Mass., 1973); and *Oakwood* at *Madison* v. *Township of Madison,* 283 A.2d 353, 357 (N.J., 1971). Respondents also apparently disagree with their own contention, citing cases from the state courts of Pennsylvania, Florida, Alabama, Illinois, Michigan, Kansas, New Jersey, Maryland and Massachusetts in their Briefs of Appellees to the Supreme Court of Virginia in *Allman* and *Williams.* Respondents submitted the case law of these states as authority for their position before the Supreme Court of Virginia. It is inconsistent to argue that *Allman* and *Williams* will not likewise be used as precedent in other states.

As to the latter contention—that statutory construction decisions of one state do not influence other states—the Supreme Court of Virginia has clearly shown its falsity. In *Ross* v. *County Board of Arlington County,*[23] the Virginia court used a New York case to help construe wording in the land use section of the Virginia Code.

> The wording of the Virginia and New York statutes is for all practical purposes identical. Both were evidently taken from the model "Standard State Zoning Enabling Act," which contains the provision. . . .

The Board has already shown that the zoning decisions judicially reversed in *Allman* and *Williams* were based upon the provisions of that very standard zoning act, various forms of which have been adopted by 47 states including Virginia.[24] The quotation from the Supreme Court of Virginia in *Ross* destroys Respondents argument and demonstrates the potential national impact of *Allman* and *Williams.*

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[23] 87 S.E.2d 794, 795 (Va. 1955).

[24] Petition for Writ of Certiorari, pp. 56-60.

CONCLUSION

For the reasons set forth herein, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

Present: All the Justices.

COUNTY BOARD OF ARLINGTON COUNTY

v.

MARY ROSE GREEN GOD

Record No. 740803

PER CURIAM

Richmond, Virginia, September 5, 1975

From the Circuit Court of Arlington County

PAUL D. BROWN, *Judge*

This is a zoning case in which the County Board of Arlington County denied the application of the landowner, Mary Rose Greene God, for rezoning from single-family residential district (R-6) to apartment house district (RA6-15) of two adjoining lots in the northern portion of the County. Upon the landowner's motion for declaratory judgment, the trial court found that the existing zoning was unreasonable, and therefore invalid, and that the denial of the rezoning was arbitrary and capricious. In its final order, the court placed the land in the zoning classification sought by the landowner.

While the appeal awarded in this case brings under review the trial court's holding that the rezoning denial was arbitrary and capricious, the principal reason we awarded the appeal was to examine the court's action in actually rezoning the land. In light of our recent decisions in the *Randall, Allman,* and *Williams* cases,[1] all handed

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[1] *City of Richmond* v. *Randall,* 215 Va. 506, 211 S.E.2d 56 (1975), *Board of Supervisors of Fairfax County* v. *Allman,* 215 Va. 434, 211 S.E.2d 48 (1975), and *Board of Supervisors of Fairfax County* v. *Williams,* — Va. —, S.E.2d — (1975).

down after the date of final judgment in the present case, we are constrained to affirm, in summary fashion, the trial court's finding of arbitrariness and capriciousness and to reverse, in similar fashion, the court's action in rezoning the land.

First, with respect to the holding that the rezoning denial was arbitrary and capricious, the evidence fully sustains the trial court's conclusion. The two lots in question, together with two other lots in different ownership, are the remnants of a larger single-family residential district established in 1950 in a block now almost entirely zoned for and devoted to apartment uses, in an area of Arlington County dominated by garden-type apartment houses. The landowner showed that the construction of single-family residences on the lots in question would be economically unfeasible; that the existing zoning was unreasonable; and that her proposed use, the construction of 10 "townhouses of garden apartment style" under an appropriate zoning classification, would be reasonable. Against this, only the opposition of a local civic association and the claim of a serious water problem, which proved to be non-existent, suggested that the present zoning should be retained.

The landowner's evidence was sufficient to overcome the presumed legislative validity of the Board's action and to show that the denial was unreasonable. The Board, however, in its turn, failed to produce evidence sufficient to show that the denial was reasonable. The question, then, was not fairly debatable. *See City of Richmond* v. *Randall, supra,* 215 Va. at 511, 211 S.E.2d at 60. Under the circumstances of this case, the denial of the rezoning application was discriminatory and, therefore, arbitrary and capricious. *See Board of Supervisors of Fairfax County* v. *Allman, supra,* 215 Va. at 445, 211 S.E.2d at 55.

With respect to the trial court's action in actually rezoning the lots in question, the landowner, in light of *Allman,*

concedes that the court "did not have the right . . . to simply rezone the land." The landowner also concedes that under the evidence before the trial court there are, in addition to the RA6-15 apartment classification she sought, other multiple-unit zoning categories which would permit her proposed use. The landowner agrees, therefore, that the case must be remanded for further consideration by the Board, at the direction of the trial court, of an appropriate multiple-unit zoning classification for her property.

Accordingly, we affirm the trial court's findings that the existing single-family zoning of the lots in question is invalid and that the Board's denial of rezoning was arbitrary and capricious. We reverse the action of the court in actually rezoning the land. The case will be remanded to the trial court with instructions to enter another order. The new order will suspend the adjudication of invalidity for a prescribed period of time and direct the Board to consider further legislative action. Because the evidence shows that the apartment-house use proposed by the landowner is reasonable,[2] the new order will enjoin the Board during the prescribed period from taking any action which would disallow such use. The new order will further provide that should the Board fail to take appropriate action within the prescribed period, the adjudication of invalidity will become operative and the injunction will become permanent, provided that the landowner shall not put her property to any uses other than those shown by the record to be reasonable.

Affirmed in part, reversed in part, and remanded.

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[2] In light of the landowner's concession that other multiple-unit zoning categories would permit her proposed use, the Board, following remand, will be free to consider such other categories in addition to the RA6-15 zoning sought by the landowner.

Present: Carrico, Harrison, Cochran, Harman, Poff and Compton, J.J.

PER CURIAM

Record No. 740584

CITY COUNCIL OF THE CITY OF FAIRFAX, VIRGINIA

v.

JOHN F. SWART, JR., ASA A. SWART and THE HECHINGER COMPANY

Richmond, Virginia, September 5, 1975

From the Circuit Court of Fairfax County

PERCY THORNTON, JR., *Judge*

The City Council (Council) of the City of Fairfax (City) denied the application of the landowners, John F. Swart, Jr., and Asa A. Swart, and their lessee, The Hechinger Company, (collectively referred to as Swart) to rezone 3.285 acres of land on Jermantown Road in the City of Fairfax from single-family residential use (R-3) to commercial use (C-2). Upon Swart's motion for declaratory judgment, the trial court found the Council's action in refusing to rezone the subject property to be unreasonable, arbitrary and capricious, and, therefore, null and void. The court, in its final order, permitted Swart to develop the land "in accordance with the . . . ordinances of the [City] relating to development in the C-2 zoning classification . . ."

As in *County Board of Arlington County* v. *God*, 216 Va. — S.E.2d — (Record No. 740803, this day decided), our principal reason for awarding this appeal was to examine the court's action in actually rezoning the land. While the City claims error in the court's finding of arbitrariness and capriciousness and in refusing to admit the evidence of one witness proffered by the City, we affirm those rulings.

With respect to the holding that the denial of rezoning

was arbitrary and capricious, the evidence fully sustains the trial court's conclusion. For a number of years John F. Swart, Jr., and Asa F. Swart have owned a 5.652 acre tract in the northwest quadrant of the intersection of Jermantown Road and Lee-Jackson Highway (Route 50) in the City. The southern 2.367 acres of the tract, which fronts on both Route 50 and Jermantown Road, is zoned commercial, as is all of the frontage on Route 50 in the City from its intersection with Routes 29-211 at Kamp Washington, approximately one-half mile southeast of the Swart tract.

The Western boundary line of the Swart tract is also the boundary line between the City and the County of Fairfax The land abutting the Swart tract on the west is comprehensively planned by Fairfax County for high density residential use, a classification permitting up to 20 dwelling units per acre. The land across Jermantown Road, to the east of the Swart tract, is zoned commercial. The evidence showed that a bank and a convenience store were already in operation there and that a six story motel was under construction. All of the road frontage on Jermantown Road for more than one-half mile south of the Swart tract was zoned either commercial or industrial.

While the property adjoining the Swart property on the north, fronting 200 feet on the west side of Jermantown Road, is still zoned residential (R-3), the adjoining tract to the north was rezoned commercial (C-2) by the Council in 1969. To the north of and adjoining this C-2 tract is a high density, multi-family housing development.

North of the Swart tract, the City owns a parcel of land fronting approximately 1500 feet on the east side of Jermantown Road, adjoining the motel site. An intermediate school, with access to both Bevan Drive, a residential street, and Jermantown Road, occupies the northern portion of this parcel.

When a comprehensive land plan for the area was last adopted by the City in 1968, this plan designated all of the frontage on Jermantown Road south of the existing multi-family housing development as an area for commercial development.

Swart's expert evidence established that the construction of single-family residences on the tract in issue was economically unfeasible; that the existing zoning was unreasonable; and that the proposed commercial use, a large hardware department store, is a reasonable use of the property and compatible with the area.

While the City presented evidence that the tract in question "could" or "might" be developed under its existing R-3 zoning, this evidence was so insubstantial, vague and speculative as to be unconvincing to the trial court, as it is to use.

Here the landowner's evidence was sufficient to overcome the presumed legislative validity of the Council's action and to show that the denial was unreasonable. Thereafter, the City failed to produce evidence sufficient to show that the denial was reasonable. The question, then, is not fairly debatable. *See City of Richmond* v. *Randall,* 215 Va. 506, 511, 211 S.E.2d 56, 60 (1975). Under the circumstances of this case, the denial of the rezoning application was discriminatory and, therefore, arbitrary and capricious. *See Board of Supervisors of Fairfax County* v. *Allman,* 215 Va. 434, 445, 211 S.E.2d 48, 55 (1975).

We find no error in the trial court's refusal to qualify Edward Trexel, a member of the City Planning Commission, as an expert witness. The qualification of an expert witness is a matter largely within the discretion of the trial court and its ruling will not be disturbed in the absence of the showing of an abuse of such discretion. *See Ames & Webb, Inc.* v. *Commercial Laundry,* 204 Va. 616, 621, 133 S.E.2d 547, 550 (1963).

The final question presented concerns the trial court's rezoning of the land. This case was decided by the Chancellor before our recent decisions in *City of Richmond* v. *Randall, supra, Board of Supervisors of Fairfax County* v. *Allman, supra,* and *Board of Supervisors of Fairfax County* v. *Williams,* 216 Va. —, S.E.2d — (1975). Since the rezoning violates the legal principles set forth in those cases, we summarily reverse that part of the final order of the trial court.

Accordingly, we affirm the trial court's finding that the existing R-3 zoning of the land in question is invalid and that the Council's denial of rezoning was arbitrary and capricious. We, likewise, affirm the trial court's ruling in refusing to qualify Trexel as an expert. We reverse the action of the court, however, in actually rezoning the land and the case will be remanded with instructions to enter another decree. The new decree will suspend the adjudication of invalidity for a prescribed period of time and remand the matter to the Council for further legislative action. Since the City has made no showing of an alternate reasonable use, the new decree will enjoin Council, during the prescribed period, from taking any action which would disallow the one use shown by the record to be reasonable. The decree of the trial court will further provide that should the Council fail to comply within the time prescribed, the adjudication of invalidity of zoning classification R-3 for the property will become operative and the injunction will become permanent, provided that Swart shall not put the property to any use other than the use shown by the record to be reasonable.

Affirmed in part; reversed in part; and remanded.